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"We ask people in the danger zone to evacuate immediately because there's a potential for a bigger eruption"

Sutopo Purwo Nugroho

As Indonesia faces an imminent eruption of Bali's restless Mount Agung volcano, which has already brought in heightened seismic activity, mudflows, volcanic ash and airport closures, we cannot ignore the other storm that lingers on the horizon, **MiFID II**.

MiFID II

ONE MONTH TO GO.

MiFID II is made up of two parts, the MiFID II directive and the MiFIR regulation.

MiFID II applies to all investment firms, including investment managers providing investment advice and portfolio management on a client-by-client basis. It also applies in some circumstances to AIFM firms (particularly those conducting Portfolio management) because of ESMA guidance and FCA implementation.

Firms should have procedures in place for the following in preparation for implementation day:

- Best Execution Policy
- Inducements
- Transaction Reporting
- Suitbaility Report
- Appropriateness
- Client Categorisation
- Conflicts of Interest
- Legal Entity Identifier (LEI)
- Compliant Handling
- Telephone Recording
- Remuneration Policy

MiFID II: FCA publishes MiFID 2 Guide Instrument

The FCA has made changes to the FCA Handbook under the MiFID 2 Guide Instrument 2017, which establishes a new Regulatory Guide. The MiFID 2 Guide (M2G) will be located on the FCA Handbook website, however it will not form part of the Handbook. The M2G is intended to help users of the Handbook navigate the complexities of MiFID II. The instrument also adds a new definition for M2G to the Handbook Glossary. The instrument comes into force on **3 January 2018**.

MiFID II: ESMA clarifies trading obligation for shares

ESMA has clarified the application of the trading obligation for shares to trade certain instruments on-venue under MiFID II.

The trading obligation requires investment firms to ensure that trades that they undertake in shares take place on a regulated market, MTF, systematic internaliser, or equivalent third country venue. Where there is a chain of transmission of orders concerning those shares, all EU investment firms that are part of the chain (either initiating the orders or acting as brokers) should ensure that the ultimate execution of the orders complies with the requirements under Article 23(1) of MiFIR.

ESMA work programme for 2018

ESMA has published its work programme for 2018 and its main areas of focus include the following: (i) providing guidance and promoting the consistent application of MiFID II, particularly in relation to investor protection and intermediaries and in relation to secondary markets; (ii) ensuring the quality, integration, usability and transparency of the data collected by ESMA, including in relation to MiFID II, AIFs, trade repositories and securities financing transactions (SFTs); (iii) contributing to the development of level 2 measures relating to the revised Prospectus Regulation; and (iv) enhancing the effectiveness and lasting impact of supervisory activities at the level of individual CRAs and TRs.

Senior Managers and Certification Regime (SMCR) update

The FCA published their long-awaited consultation paper in July 2017 with regards to SMCR. SMCR has been applied to Banks, Large insurers and other PRA-regulated entities since March 2016, and the FCA now want to extend the regime to all FCA regulated firms.

There are three main areas of change:

- Senior Managers Regime – all existing controlled functions are swept away and replaced with new definitions; all FCA authorised firms will be required to have at least one senior manager.
- Certification Regime – replacing the current CF30 roles and others; the Certification Regime requires firms to assess the fitness and propriety of certain employees who by virtue of nature of the role, could pose a significant harm to the firm or any of its customers.
- Conduct Rules – which will apply to all staff (plus extras ones for Senior Management).

The FCA proposes to:

- Apply a standard set of requirements to all FCA solo-regulated firms known as the 'core regime';
- have extra requirements for a small number (fewer than 1%) of firms whose size, complexity and potential impact on consumers warrant more attention –called the 'enhanced regime'; and
- apply a reduced set of requirements for a group of firms seen as 'limited scope'.

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Criminal Finance Act 2017

The Criminal Finances Act 2017 came into force on 30th September 2017. The Government believes that relevant bodies should be criminally liable where they fail to prevent those who act for, or on their behalf from criminally facilitating tax evasion.

The aim of the Act is to significantly improve the government's ability to tackle money laundering and recover the proceeds of crime, and is considered to be the most significant development in the UK's anti-money laundering laws since the introduction of the Bribery Act in 2010.

What is an offence under the Act?

1. Criminal tax evasion by a taxpayer (individual or firm);
2. Criminal facilitation of the above offence by a representative of the firm;
3. The firm failed to prevent its representative from committing the criminal act outlined in number two.

What should you be doing as a Firm?

1. Risk Assessment
2. Proportionality of risk based prevention procedures
3. Top level commitment
4. Due diligence
5. Communication
6. Monitoring and review

General Data Protection Regulation (GDPR)

From **May 2018** on, the EU General Data Protection Regulation (GDPR) will apply to all European entities and – due to the Extended territorial scope – to a large extent also to entities outside Europe.

The GDPR leads to a significant rise in data protection compliance duties as well as significantly increased fines of up to 4% of the global annual turnover of the whole company group. Thus, even data protection non-compliance in smaller and less important offices of a company group may now lead to significant ramifications.

We recommend the following steps to prepare for the GDPR:

Step 1: Gap analysis

Step 2: Risk analysis

Step 3: Project steering and resource/budget planning

Step 4: Implementation of a data protection structure

Step 5: Local Add-on Requirements 6. Coping with the Brexit

Advisers falling behind on GDPR compliance

According to the Financial Reporter, two thirds of advisors (67%) say they do not yet have a plan to ensure GDPR is fully implemented by the enforcement date of **25 May 2018**, with almost one in ten (9%) saying they were not aware of the new regulation.

Rob Walton, Chief Operating Officer at Intelliflo commented: "Although May might seem like a long way off, it's actually very little time for advisers to start preparing for the enforcement date of GDPR.

The new regulation is far more detailed, with new obligations and requirements and it's essential that advisers can demonstrate that they have taken action to ensure they are fully meeting these. Personal data is the very essence of financial advice therefore GDPR could have a significant impact on most."

Fourth Money Laundering Directive

The Fourth Money Laundering Directive (4MLD), which came into force on 26th June 2017 is designed to bring a more robust risk-based approach to the prevention of money laundering and terrorist financing across all EU Member States.

The following are key changes under 4MLD:

- Written Risk Assessment: The 4MLD introduced new requirements on firms to take steps to identify and assess the risks of money laundering and terrorist financing and to document its methodology.
- Simplified due diligence: The 4MLD removes the automatic entitlement to apply SDD for specific customers. The firm will need to determine the level of risk posed by a customer prior to applying SDD.
- Politically Exposed Persons (PEP): The definition of PEP has been changed to formally encompass persons entrusted with a prominent public position domestically, as well as domestic PEPs who work for international organizations.
- Tax Crimes: Tax crimes are now included as a predicate offence for money laundering for the first time in the EU.
- Record Keeping: Firms will be required to retain client information for the maximum period of five years after the end of the business relationship with the client.

FCA finalises revised Payment Services Directive (PSD2) requirements

On 19 September the FCA published its approach to implementing the revised Payment Services Directive (PSD2).

PSD2 is an EU Directive which sets requirements for firms that provide payment services, and will affect banks and building societies, payment institutions, e-money institutions and their customers.

PSD2 aims to:

- Promote innovation;
- improve consumer protection;
- make payments safer and more secure; and
- drive down the costs of payment services.

The new regime will be in force from **13 January 2018**.

PSD2 also introduces a number of new requirements around how firms treat their customers and handle their complaints, and the data they must report to the FCA.

Firms should consider whether they now need to seek authorisation or registration because of changes to the scope of regulation made by PSD2.

Applications opened on **13 October 2017**.

Culture and conduct - extending the accountability regime

Jonathan Davidson, Director of Supervision – Retail and Authorisations at the FCA delivered a speech on Culture and conduct at the City and Financial Summit, London.

Key highlights included:

- Cultural change requires individual engagement and accountability.
- Culture may not be measurable, but it is manageable, for example through incentives and governance.
- The FCA want consumers to understand their expectations around culture in firms and feel able to speak up when standards aren't met.
- An ethical culture can be more powerful than one based solely on financial incentives.

Jonathan explains that it is also important that there are clear lines of accountability between a decision made and the senior manager who made it or oversaw it. The SMCR therefore requires that each and every senior manager has clear accountabilities set out in an individual Statement of Responsibility.

Effective compliance with the Market Abuse Regulation – a state of mind

Julia Hoggett, Director of Market Oversight at the FCA, delivered a speech on 14 November 2017 on the above at the 'Recent Developments in the Market Abuse Regime' conference.

Key highlights included:

- Effective oversight and compliance cannot and should not stay still.
- The manner in which the FCA is set up to surveil the markets today is very different from our structure several years ago, and will continue to evolve.
- Market abuse impacts the smooth operation of our markets by adding cost or reducing returns for participants and ultimately eroding trust in the UK markets.
- Trust is essential in any society and necessary to ensure markets function well and efficiently.

Key quotes from the speech:

- "Why are firms not aligning their efforts to combat financial crime with their efforts to combat market abuse? They are inextricably linked"
- "We need to take all the steps we can to prevent market abuse from taking place within our markets"
- "We must continue to adapt both to technological change and to the evolution of market behaviours, in order to remain as capable as we possibly can be of catching those perpetrating market abuse"
- "I have come to the conclusion that at its most effective, compliance with MAR is a state of mind"

FCA sets out agenda and priorities for consumer credit

The FCA has published the outcome of its review into high-cost credit, which includes its assessment of the effectiveness of the payday loan price cap.

The review provides clear evidence that FCA regulation of high-cost short-term credit (often known as 'payday lending') has delivered substantial benefits to consumers. The review found that 760,000 borrowers in this market are saving a total of £150m per year, firms are much less likely to lend to customers who cannot afford to repay and debt charities are seeing far fewer clients with debt problems linked to high-cost short-term credit.

The FCA has therefore decided to leave the existing payday loan price cap in place, and to review it again in 2020.

However, the review has also established clear concerns with other forms of high-cost credit. In particular, the FCA believes that fundamental changes in the way that unarranged overdrafts are provided may be necessary. Charges for unarranged overdrafts are often high after taking into account the risks to lenders, and can be complex and thus hard for consumers to understand.

In addition, the FCA has published a consultation paper (CP17/27) on changes to its rules and guidance on assessing creditworthiness.

The consultation focuses on:

- the distinction between affordability and credit risk;
- the factors to be used when deciding the proportionality of assessments;
- the role of income and expenditure information; and
- the FCA's expectations around firms' policies and procedures.

The FCA's approach to PPI

The FCA is launching a campaign to inform people about the **29 August 2019** deadline to complain about payment protection insurance (PPI).

The consumer campaign is being funded by 18 firms that together receive more than 90% of complaints about the sale of PPI. These firms include banks and other providers.

Improvements and expectations:

The FCA asked these firms to make a range of improvements to the way people can complain to them about PPI, ahead of the launch of their campaign on 29 August 2017.

The improvements should make it easier for people to:

- check online if they had PPI
- complain online about PPI using a simple, straightforward form
- find more information about PPI on the FCA and Financial Ombudsman Service websites
- find additional help from bodies like Citizens Advice
- The improvements to their websites will also support people us

The FCA consults on client money and unbreakable deposits

The FCA has published a consultation paper (CP17/29) on minor amendments to the Client Assets sourcebook (CASS). The proposals are to address potential harm to consumers caused by investment firms having difficulties depositing client money in accordance with CASS requirements.

Firms are experiencing difficulties depositing client money with banks due to the unintended combined effects of a rule in CASS 7 and the prudential liquidity rules applicable to banks. The FCA is seeking to prevent the potential harm that consumers may suffer if firms cannot deposit client funds at banks which meet their risk tolerance. This could result in money being returned to the customer or being deposited in banks which do not meet due diligence requirements.

CMA on banking charges

The Competition and Markets Authority (CMA) has announced that new changes have come into force as part of its shake up of the banking industry.

The new changes include requiring banks to be more transparent about the cost of arranged and unarranged overdrafts, and to be clearer about the cost of borrowing for small and medium-sized businesses (SMEs). For overdrafts, the changes will involve banks setting and publicising a ceiling on their unarranged overdraft charges, in the form of a monthly maximum charge. For lending to SMEs, providers of unsecured loans and overdrafts to SMEs, for values up to **£25,000**, will have to publish and clearly display the rates they will charge for doing so.

The future of LIBOR

Andrew Bailey, Chief Executive of the FCA delivered a speech on the future of London Interbank Offered Rate (LIBOR).

Key highlights included:

- Although significant improvements have been made to LIBOR since April 2013, the absence of active underlying markets raises a serious question about the sustainability of the LIBOR benchmarks that are based upon these markets.
- Panel bank support to sustain LIBOR until end-2021 will enable a transition that can be planned and executed smoothly.
- Work must begin in earnest on planning the transition to alternative reference rates that are based firmly on transactions.

2017 FCA launches Wholesale Insurance Brokers Market Study

The FCA has launched a market study to assess how competition is working in the wholesale insurance broker sector. The FCA wants to ensure that the sector is working well, and fosters innovation and competition in the interests of its diverse range of clients.

There have been significant changes in the wholesale insurance sector in recent years which has seen brokers developing new services and business practices. The FCA plans to explore how competition is currently working and whether it could work better.

The FCA believes that effective competition contributes to ensuring London remains an international centre for insurance.

The FCA's study will:

- Look at how brokers compete in practice and whether they use their bargaining power to get clients a good deal.
- Assess what conflicts of interest exist, how they are managed and how they affect competition and client outcomes.
- Examine how broker conduct impacts on competition in the sector.

FCA Enforcement cases

Former bank exec convicted in $3.5bn fraud case

A former head of global foreign exchange cash trading has been found guilty of defrauding a client in a $3.5bn currency deal.

UK citizen, along with a fellow banker, were charged in July 2016 with conspiring to defraud a client by rigging the $3.5bn foreign exchange trade.

The former cheated a client out of millions of dollars by misusing confidential information he received about the client's transaction.

The evidence shows that they caused the $3.5 billion foreign exchange transaction to be executed in a manner that was designed to spike the price of the Pound Sterling, to the benefit of the bank and at the expense of their client.

In total, the bank generated profits of roughly $7.5 million from its execution.

Sentencing has not yet been scheduled.

FCA fines bond trader £60,000 for market abuse

Following an investigation, the FCA found that an experienced trader, engaged in market abuse by creating a false and misleading impression as to supply and demand in the market for Dutch State Loans (DSL) on 12 occasions in July and August 2014.

On 11 occasions, the trader entered a series of quotes that became the best bids on BrokerTec, an electronic trading platform, giving the impression that he was a buyer in a DSL. Other market participants who were tracking his quotes with algorithms followed him in response and raised their bids. The defendant then sold to those other participants and cancelled his own quote.

While the FCA did not fnd that he knew his conduct amounted to market abuse, the FCA considered he was negligent in not realising this.

The FCA has therefore imposed a £60,090 financial penalty on him.

FCA fines and bans wife and bans husband financial advisor for lack of integrity

The FCA has banned the husband and wife from working in financial services for integrity failings. Additionally, the latter has been fined £50,000 for attempting to mislead the FCA during an FCA interview.

Following action taken by the FCA in May 2011 over mis-selling of geared traded endowment policies, their company became insolvent and went into sequestration.

The couple made inadequate, incomplete and misleading disclosures to their Trustee about their financial situation during their sequestration, in order to avoid the Trustee inquiring into, and potentially recovering, assets for the benefit of their creditors.

Mark Steward, Executive Director of Enforcement and Market Oversight, said:

'Theymisled their creditors, especially the FSCS, in a calculated way. Their misconduct demonstrates a serious lack of integrity.

Upper Tribunal upholds the FCA's decision to fine and ban a former CEO of adviser network.

On 8 August 2017, the Upper Tribunal upheld the Financial Conduct Authority's (FCA) decision to ban the former CEO from performing FCA significant influence functions. The Tribunal also upheld the FCA's decision to impose a financial penalty of £86,691 on him.

The former CEO was the majority shareholder and de facto CEO of the advisor network. The network at its peak, in March 2011, consisted of 397 appointed representatives and 516 registered individuals.

The Tribunal agreed with the FCA that the defendant failed to act with due skill, care and diligence in carrying out his role of director and as de facto CEO of the Firms.

The Tribunal also agreed with the FCA that his failings were particularly serious in the light of findings made against him by the FCA's predecessor, the Financial Services Authority (FSA) in a Final Notice of 24 February 2010.

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